

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 10-0081

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KENTON RICHARD WEIMER,

Defendant and Appellant.

APPELLANT'S BRIEF

ON APPEAL FROM THE MONTANA ELEVENTH JUDICIAL
DISTRICT COURT, FLATHEAD COUNTY,
HONORABLE TED O. LYMPUS, PRESIDING

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I. STATEMENT OF THE ISSUE

The State agreed in a written Plea Agreement to recommend the maximum forty-year sentence in return for Kenny Weimer's guilty plea to mitigated deliberate homicide. At sentencing, the State urged the Court to restrict Weimer's parole eligibility for twenty years. The District Court erred in denying Mr. Weimer's motion for relief due to this breach of the plea agreement.

II. STATEMENT OF THE CASE

Kenny Weimer appeals from the district court's Order denying Weimer's motion for relief, on the claim that the state breached the written plea agreement when it make an additional, more punitive recommendation than it had promised to make in the plea agreement.

III. STATEMENT OF THE FACTS

A. Procedural Background of Underlying Prosecution.

In the early morning hours of May 1, 2007, the Flathead County Sheriff's Office received a telephone call from a person who indicated that he was injured. Law enforcement officers were able to trace the call, and responded. They found 18-year old Kenny Weimer, who had suffered self-inflicted traumatic gunshot wounds to his face and head. The body of Ms. Tarisia Caron was found next to

Kenny. Ms. Caron was dead, and had suffered major trauma to the head that appeared to be a gunshot wound. See, Information, Affidavit; District Court docket number (“DC __”) 1, 3. A handwritten document dated May 1, 2007 and signed “Tarisia Caron,” which was subsequently introduced in court, stated: “I Tarisia do hereby give Kenton Richard Weimer permission to help/assist w/ my suicide being of sound body and mind.”¹

On May 4, the State filed an Information charging Kenny Weimer with the offense of deliberate homicide, in violation of § 45-5-102(1), MCA. The prosecutor at this time was Ms. Tammi Fisher. Mr. Thane Johnson was appointed as counsel for Weimer. DC 5.

1. Change of Plea Hearing.

Kenny Weimer, with counsel, entered into a written plea agreement with the state on November 29. DC 19, a copy of which is included in the Appendix to this Brief as Exhibit A. In this agreement, the state agreed to file an amended charge of mitigated deliberate homicide, and to forego seeking a sentence enhancement for use of a weapon pursuant to § 46-18-221(a), MCA. The Plea Agreement also set out the parties’ agreement as to what sentence the state would recommend. The

¹ This document was introduced at Weimer’s change of plea hearing. See, Minute Entry, DC 17; DC 18, Ex. A.

state “agree[d] to recommend that the Defendant be sentenced to the Montana State Prison for a term of forty (40) years with no time suspended. It is understood that this recommendation is the maximum sentence under Section 45-5-103(1).” DC 19, at 4.

The state also agreed that Kenny would be entitled to withdraw from the plea agreement under any of three scenarios, including in the event that “[s]ubsequent to the entry of a guilty plea in the event the State fails to perform its obligations pursuant to this agreement[.]” Ibid.

Kenny appeared in court on November 29, 2007 to change his plea and enter a plea of “guilty” to the amended charge. The written plea agreement was filed after the hearing. See, Change of Plea Transcript (“COP Tr.”), at 1-8, 40.² At the hearing, the prosecutor informed the judge that Weimer would be charged by an amended Information with mitigated deliberate homicide, for which “the maximum penalty is 40 years in the Montana State Prison.” COP Tr., at 6:24-25. The court then asked Weimer if he understood the allegation in the amended Information, which carried “a maximum potential penalty in the event of a conviction of a term of incarceration at the Montana State Prison of 40 years[.]”

² The transcript of the plea hearing is attached as Exhibit C to Defendant’s Reply to State’s Amended Response to Motion for Relief, DC 58.

COP Tr., at 7:14-17. Weimer responded that he so understood, and he entered a plea of guilty to the amended charge. COP Tr., at 7.

The court then accepted the plea. “[T]he defendant having indicated that the plea that he has entered has been entered knowingly and voluntarily, and the Court so finds and further finds there be a sufficient factual basis, the plea is accepted ...” COP Tr., at 40:3-13. The court directed that a presentence investigation and report (PSI”) be prepared. COP Tr., at 40.

A PSI was filed on January 15, two days before the sentencing hearing. DC 25. The probation officer who submitted the report recommended that the court impose a sentence harsher than the sentence the state agreed to recommend in the plea agreement. Specifically, the officer recommended that the court order that Weimer not be eligible for parole for 20 years of the 40 year term of imprisonment, because under the terms of the state’s promise to recommend 40 years with no time suspended, Weimer would be parole eligible after having served 25 per cent of his 40-year sentence. The probation officer believed that Weimer should have to serve 50 per cent of his sentence before he became parole eligible. DC 25, at 7 .

2. Sentencing Hearing.

By this stage, a new prosecutor had been assigned to the case. At the January 17 sentencing hearing, deputy county attorney Ms. Lori Adams urged the Court to impose the sentence recommended in the PSI:

the State is recommending that for this crime you sentence the Defendant to 40 years in the Montana State Prison with none of them to be suspended. *We also concur with the PSI that you give a parole restriction for half of that sentence, being 20 years.*

January 17, 2008 Sentencing Hearing Transcript ("Sent. Tr."), attached to Weimer's Motion for Relief as Exhibit B, at 47:2-12 (emphasis added). Ms. Adams immediately sought to justify this recommendation in light of the terms of the plea agreement, which did not include any mention of a restriction on parole eligibility.

Your Honor, the plea agreement in this case calls that the State would ask for the 40-year sentence with none of it be suspended, it did not preclude the State from asking for a parole restriction, and therefore this recommendation is not in any way violative of the plea agreement in this case.

Sent. Tr., at 47:18-24. In other words, while the state was bound to make the specific recommendation agreed to in the plea agreement, it believed it was not barred from recommending imposition of any other condition or restriction which was not specifically prohibited by the agreement.

The defense asked the court to impose a 40-year sentence, with 20 years suspended, and with no restriction on parole eligibility. Sent. Tr., at 57:3-9.

The court imposed a 40-year sentence in the Montana State Prison, and ordered that Mr. Weimer's eligibility for parole be restricted for 20 years. Sent. Tr., at 63-64; Judgment, DC 30, a copy of which is included in the Appendix to this Brief as Exhibit B.

B. Proceedings on Mr. Weimer's Motion for Relief Due to State's Breach of the Plea Agreement.

Kenny Weimer subsequently moved for relief, asserting that the state had breached the plea agreement when it adopted and recommended the parole eligibility restriction set forth in the PSI. Further, the state's breach violated his state and federal due process rights.³ For relief, he asserted that he should be afforded the initial right to choose from available remedies, which include rescission of the agreement and withdrawal of the plea, or specific performance. DC 40.

³ Motion for Relief, DC 40, at p. 5, ¶ 17; Brief in Support, DC 41.

1. The State's Initial Agreement that Weimer was Entitled to Relief.

The state responded to the Motion by agreeing that Weimer should be entitled to a new sentencing hearing. However, the state did not admit that it breached the plea agreement. State's Response, DC 44. Weimer replied that the state's suggested procedure by which Weimer would be resentenced was problematic, as parties may not simply agree that the defendant is entitled to relief. There must be some legal basis on which to vacate an existing judgement and sentence. Defendant's Reply to State's Response, DC 47, citing State v. Evert, 2004 MT 178, 322 Mont. 105, 93 P.3d 1254.⁴

After Weimer's reply, the state then shifted course. It argued that Kenny Weimer was not entitled to relief, and claimed for the first time that it had an unwritten understanding with defense counsel, Mr. Johnson, by which the state was free to argue for a parole eligibility restriction. State's Amended Response, DC 52, at 3. In reply, Weimer cited numerous authorities which have held that unwritten oral agreements may not be enforced to alter the terms of written plea agreements. DC 58.

⁴ In Evert, this Court held that "[j]urisdiction is defined by law. ... Jurisdiction cannot be conferred by consent of the parties or the court. ... Once a valid sentence is imposed, the district court lacks jurisdiction to modify that sentence absent specific statutory authority." 2004 MT 178, at ¶ 14.

2. The Evidentiary Hearing.

During a September 16, 2009 evidentiary hearing on the motion for relief, Weimer argued that resolution of the issue of whether the state breached the plea agreement should be limited to the terms of the plea agreement itself. Evidentiary Hearing Transcript (“Evid.Tr.”), at 4-6. Weimer testified about his understanding of the terms of the plea agreement, and specifically, his understanding of what terms the state would recommend as a sentence.

Kenny had only an eighth-grade education. Evid.Tr., at 28. He said that he understood at the time he entered into the Agreement that the state would recommend a forty year sentence, with no time suspended. He understood from the plea agreement that the maximum sentence was 40 years, and that the state would ask for the maximum. Evid.Tr., at 15-16, 18-19. If the judge followed the prosecutor’s recommendation, as stated in the Plea Agreement, he would have to serve 10 years in prison before he became eligible for parole. Evid.Tr., at 17.

Kenny testified that the issue of when he would be eligible for parole was “a very important factor” as he considered whether to change his plea. He discussed the issue of parole eligibility with his mom, and she encouraged him to take the plea offer. Evid.Tr., at 17-18. Kenny testified that his attorney did not explain that the state would be free to ask for more time than was stated in the written plea

agreement, to the best of his recollection. Evid.Tr., at 16. Kenny said that his attorney talked to him before sentencing, and “told me that [the state] would be recommending 40 years, there was never a mention of a parole restriction.”

Evid.Tr., at 19:9-11.

Kenny did not know that the state felt free to recommend a 20-year restriction on parole eligibility. If he had known that the state believed it was free to recommend a parole eligibility restriction, one which would result in him serving 20 years, as opposed to 10 years, before he became parole eligible, he would not have agreed to plead guilty based on the plea agreement. Evid.Tr., at 17-18.

Ms. Sharon Weimer, Kenny Weimer’s mother, testified that she involved herself in efforts relating to her son’s defense. She had numerous discussions with Mr. Johnson. She paid for an airline ticket for Mr. Johnson to travel to Seattle to meet with Kenny while he was hospitalized there for treatment for his wounds. Evid.Tr., at 34-35.

In Ms. Weimer’s discussions with Kenny’s attorney, he told her that the state would ask for “the maximum 40 years.” Evid.Tr., at 36. She understood that Kenny would have to serve a quarter of that time before he could become eligible for parole, and this was an important factor to her. Evid.Tr., at 36, 37. After she

discussed the plea agreement with Mr. Johnson, Ms. Weimer encouraged Kenny to sign the plea agreement. She told Kenny to take the deal because she understood that Kenny would become eligible for parole after he had served 10 years, if the judge imposed the 40-year sentence the state would recommend. Ms. Weimer stated that she would not have encouraged or recommended that Kenny take the deal, if she had known that regardless of what was written in the plea agreement, the state could also recommend a parole eligibility restriction. Evid.Tr., at 37.

Ms. Keely Doss is the probation and parole officer who submitted the presentence investigation report. She testified that she had reviewed the plea agreement, and understood from that document that the state would recommend a term of 40 years, with no time suspended. Kenny would have been eligible for parole in 10 years, under this recommendation. Ms. Doss believed that Kenny should serve a longer period of time than 10 years, so she recommended in the PSI that he not be parole eligible until he completed half of the 40 year sentence. Evid.Tr., at 6-10. She also understood that the maximum sentence for mitigated deliberate homicide was 40 years. Evid.Tr., at 10.

Ms. Tammi Fisher negotiated the plea agreement with Mr. Johnson. Evid.Tr., at 40. She said that it was her conviction that Kenny should serve every day of the 40 years in prison. Evid.Tr., at 42, 43. She made clear that she did not

have any discussions with Mr. Johnson about when Kenny would be eligible for parole under a 40 year term. Evid.Tr., at 43. She agreed that the plea agreement was silent with regard to any mention of a parole eligibility restriction. Evid.Tr., at 45-46.

She claimed that she insisted upon the insertion into the plea agreement of a clause that stated it was understood that the state's recommendation of a 40 year term with no time suspended "is the maximum sentence under Section 45-5-103(1)." Fisher said she wanted this clause put in the plea agreement because she wanted it "crystal clear that this young man should spend 40 years in prison[.]" Evid.Tr., at 44. She claimed that the "maximum sentence" clause covered what she wanted: the state could ask for the maximum sentence - "40 straight" - whether it was forty years with no parole eligibility, or 40 years with 20 suspended. Evid.Tr., at 44.

Mr. Johnson, Weimer's former counsel, testified that he and Ms. Fisher negotiated an agreement, "primarily right out there in the lobby on a Thursday." Evid.Tr., at 22. Johnson drafted the plea agreement. Evid.Tr., at 24. Johnson stated it was his "impression" that under the plea agreement, the state could recommend "any legal sentence under mitigated deliberate homicide, I know the language is the maximum sentence." Evid.Tr., at 22. He said that Ms. Fisher told

him she wanted Weimer to serve 40 years: “[s]he indicated to me that she believed she could argue for the maximum and I - it - it was my impression at all times that it was Katy bar the door... as long as it was under the legal sentence of mitigated deliberate homicide.” Evid.Tr., at 24.

Johnson said that he spoke with Kenny about the plea negotiation, and it was Johnson’s “best recollection” that “I explained what the maximum sentence meant to me. Um, how - however, I mean it’s been quite some time since that time so I can’t specifically state each and every conversation that I had with him.” Evid.Tr., at 23. When asked if he believed Kenny understood that the state was seeking “the maximum sentence of the 40 years” Johnson responded, “my impression of the plea agreement was that the State was free to argue for any legal sentence, that was always my impression. Um, now for me to try to - to get into what, uh, Kenny Weimer, uh, understood of the plea agreement is a difficult position for me to be.” Evid.Tr., at 23.

Johnson believed that he and Ms. Fisher discussed whether the state reserved the right to argue for a parole eligibility restriction, before the plea agreement was drafted. Evid.Tr., at 26. Contrary to Kenny and Sharon Weimer’s testimony, Johnson’s best recollection was that he told Kenny that apart from what was in the written agreement, the state would recommend a parole eligibility

restriction, and this would not constitute a breach of the plea agreement. Evid.Tr., at 28-29.

Johnson was asked whether the “meeting of the minds” included Johnson and the prosecutor, but not Weimer. In response, Johnson expanded on the fact that he might not have adequately explained the terms to Kenny. He said that to the best of his recollection, “we discussed it. Did I - did I get - get everything conveyed to Mr. Weimer that I needed to convey? If I didn’t, you know, the buck stops here, and that’s all I can say.”

Q. And it’s possible that his understanding of the plea agreement and the State’s understanding of what they could do, and it’s possible that his understanding of what maximum sentence really meant is the question today?

A. It - it - it is possible that he did not understand that. That that’s - that’s a fact.

Q. So in other words the meeting of the minds was between you and the prosecution. You can’t say that Mr. Weimer had a meeting of the minds in - in the sense with the prosecution?

A. What I can’t say is that - is that I explained it well enough to him. I mean I can’t say that - I -cause I can’t - I don’t have something in writing, I don’t have - I mean I’m using the best of my recollection. I know what my impression of the plea agreement was. If I didn’t convey it well enough to Mr. Weimer, the buck stops here, that’s what I’m saying.

Evid.Tr., at 31:4-25; at 32:1.

Johnson said that Lori Adams, who took over the case for the prosecution, told him on the day of sentencing that she would adopt the recommendation of the PSI, and ask for a 20-year parole eligibility restriction. She told Johnson that she believed this recommendation would not violate the plea agreement. Johnson said he told Adams that he did not believe this would constitute a breach of the agreement. He did no legal research to inform his decision. Evid.Tr., at 25-27. At the evidentiary hearing, the state did not offer any written documentation to confirm the existence of any discussions between defense counsel and either prosecutor, or defense counsel and Mr. Weimer.

3. The District Court's Ruling.

The district court denied relief. Findings of Fact, Conclusions of Law and Order (hereafter, "Order"), DC 73, a copy of which is included in the Appendix to this Brief as Exhibit C. The court found that it was important to the defense to get the charged reduced, and to get the state to agree not to seek an enhancement for use of a weapon. The state made it clear to the defense that it would seek "the maximum penalty." The written plea agreement provided that the state would seek the maximum sentence of 40 years. Order, at 4, Findings 2, 3, 4. The court found that both the state and the defense received the benefit of their agreement. Id., at 5, Finding 13.

The court made two findings relative to various understandings of the plea agreement terms. First, the court found that “[b]oth parties believed that the agreement reached allowed the State to request a parole restriction.” Order, Finding 5. Next, the court found that on November 28, 2007, the day before Weimer appeared in court and changed his plea, defense counsel “drafted the plea agreement and he discussed the parameters thereof with his client both before and at the sentencing hearing.” Order, Finding 6.

The court rejected the testimony of Kenny Weimer, Sharon Weimer, his mother, and Keely Doss, the author of the PSI. Without explanation, the court found that Kenny Weimer’s statement that “he believed the agreement precluded a parole restriction is not credible.” Order, Finding 10. The court found that Ms. Doss offered only “speculations,” which were irrelevant because the plea agreement was between the state and the defense. Order, Finding 11. For the same reason, any conversations between Mr. Weimer and his mother were deemed irrelevant. Order, Finding 12.

The court concluded, as a matter of law, that both parties received the benefit of their respective agreements. One factor that a court should examine in determining whether to let a defendant withdraw a plea is whether the plea was given in exchange for the dismissal of another charge. Here, the state agreed to

reduce the charge, and agreed not to seek an enhancement. Order, Conclusion 3. The court further concluded that the probation officer's recommendation in the PSI was not equivalent to the recommendation by the prosecutor. Order, Conclusion 4.

Next, the court concluded that Weimer should be responsible for any ambiguity in the agreement. The court did not make a specific determination that the term "It is understood that this recommendation is the maximum sentence" was ambiguous, nor did the state specifically argue that the term was ambiguous. However, "any ambiguity" as to what this term meant is to be borne by Weimer, under the general contract law rule that ambiguities in a written contract are to be construed against the drafter, and Weimer's Attorney drafted the plea agreement. Order, Conclusion 5.

The court concluded that "the plea agreement allowed the State to seek any legal sentence including a parole restriction," as testified to by the prosecutor and defense counsel. Order, Conclusion 6. Therefore, the state did not breach the plea agreement. Order, Conclusion 7.

Kenny Weimer timely appeals from the court's denial of relief.

IV. SUMMARY OF THE ARGUMENT

In return for a guilty plea to mitigated deliberate homicide, Kenny Weimer bargained for a recommendation by the state of a term of 40 years, with no time suspended. The parties agreed in writing that this 40-year recommendation “was the maximum sentence” under the mitigated deliberate homicide statute. The plea agreement contained no express provision permitting the state to recommend any restriction on Weimer’s parole eligibility. Thus, the state’s request for imposition of a 20-year parole restriction constitutes a breach of the plain language of the written plea agreement.

The district court found that counsel for the state and the defendant had an unwritten side agreement that a clause in the plea agreement should be interpreted to permit the state to recommend imposition of a parole restriction. The court’s critical findings regarding the supposed understanding are clearly erroneous. The court also erred as a matter of law. Statutes governing acceptance of guilty pleas, in order to ensure that the plea is voluntary, principles of contract law, and due process guarantees all required that the state be held to the literal terms of the plea agreement. The court’s failure to hold the state to its promise constitutes reversible error.

V. ARGUMENT

THE DISTRICT COURT ERRED, BOTH FACTUALLY AND AS A MATTER OF LAW, IN HOLDING THAT THE STATE DID NOT BREACH THE PLEA AGREEMENT BY RECOMMENDING THAT THE COURT RESTRICT MR. WEIMER'S PAROLE ELIGIBILITY.

A. Standards Of Review.

Based upon facts as determined by the fact-finder, the question of whether the state breached the terms of a plea agreement is a question of law which this Court reviews de novo. State v. Shepard, 2010 MT 20, ¶¶ 7-8, 355 Mont. 114, 225 P.3d 1217.

This Court will review the record to see if the findings are supported by substantial evidence. If they are, the Court will determine if the trial court has misapprehended the effect of the evidence. If substantial evidence exists and the effect of the evidence has not been misapprehended, this Court may still conclude that a finding of fact is clearly erroneous when, although there is evidence to support it, a review of the record leaves this Court with the definite and firm conviction that a mistake has been made. "Substantial evidence" and "clearly erroneous" are not synonymous. A finding may be set aside, though supported by substantial evidence, if found to be clearly erroneous. In re Matter of G.M., 2008 MT 200, ¶¶ 23, 39, 344 Mont. 87, 186 P.3d 229.

Breach of a plea agreement can implicate due process concerns. See, Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); Brown v. Poole, 337 F.3d 1155, 1159 (9th Cir. 1003); State v. Munoz, 2001 MT 85, ¶ 13, 305 Mont. 139, 23 P.3d 922 (identifying equitable remedies which are available “to safeguard a defendant’s due process rights” when the state breached a plea bargain agreement); and, State v. Brown, 606 N.W.2d 670, 674 (Minn. 2000)(allowing the government to breach a promise that induced a guilty plea violates due process). Questions of constitutional law are subject to plenary review by this Court and the district court’s interpretation of the law is reviewed for correctness. State v. Webb, 2005 MT 5, ¶ 9, 325 Mont. 317, 106 P.3d 521.⁵

B. Discussion.

Because the process of pleading guilty to a criminal charge involves a waiver of numerous constitutional rights, including the right to a jury trial, a guilty plea must be a voluntary, knowing and intelligent choice among the alternative courses of action. State v. Radi, 250 Mont. 155, 159, 818 P.2d 1203, 1206 (1991), quoting North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162

⁵ Mr. Weimer relies on the Due Process Clause of the Fourteenth Amendment and Article II, § 17 of the Montana Constitution, and cases applying these guarantees.

(1970). A defendant in a guilty plea relinquishes the constitutional right to a trial, so “the integrity of our judicial system requires that the government strictly comply with its obligations under a plea agreement.” United States v. Mondragon, 228 F.3d 978, 981 (9th Cir. 2000). “When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.” Santobello, 404 U.S. at 262; State v. Allen, 199 Mont. 204, 208, 645 P.2d 380, 382 (1981); State v. Bowley, 282 Mont. 298, 310, 938 P.2d 592, 599 (1997).

1. The State Breached the Plea Agreement When it Recommended the Parole Eligibility Restriction.

“Prosecutors who engage in plea bargaining must meet strict and meticulous standards of both promise and performance as a plea of guilty resting in any significant degree on an unfulfilled plea bargain is involuntary and subject to vacation. Prosecutorial violations, even if made inadvertently or in good faith to obtain a just and mutually desired end, are unacceptable.” State v. Rardon, 1999 MT 220, ¶14, 296 Mont. 19, 986 P.2d 424; State v. Rahn, 2008 MT 201, ¶14, 344 Mont. 110, 187 P.3d 622.

Prosecutors must adhere to the express terms of a plea agreement, and must also honor the spirit of the agreement. Where the state has agreed to recommend a

particular sentence, it is obligated to present its case to the sentencing judge in a way that does not undermine its contractual obligations. Rahn, 2008 MT 201, ¶14. See also, State v. Wills, 102 P.3d 380, 382 (Idaho App. 2004)(a prosecutor may not circumvent a plea agreement through words or actions that convey a reservation about a promised recommendation); State v. Foster, 180 P.3d 1074, 1080 (Kan. App. 2008)(a prosecutor violates a plea agreement when his words or actions cast substantial doubt on the recommendations of the plea bargain); State v. Bearse, 748 N.W.2d 211, 216 (Iowa 2008); United States v. Camarillo-Tello, 236 F.3d 1024, 1027 (9th Cir. 2001)(a prosecutor's promise is not fulfilled if, in making a recommendation, the prosecutor contradicts that recommendation with statements indicating a preference for a harsher sentence).

Should the state intend to reserve the right to present facts and argument pertaining to sentencing, such a commitment should be made explicit in the plea agreement. State v. Stubbs, 972 P.2d 843, 845 (Nev. 1998)(citation omitted). A defendant should not be forced to anticipate loopholes that the state might create in its own promises. State v. Blackwell, 522 S.E.2d 313, 315 (N.C. App. 1999).

It is beyond dispute that the state breaches a plea agreement when its recommendation is not what had been agreed upon in a plea agreement. Rahn, 2008 MT 201, ¶23; State v. Rardon, 1999 MT 220, ¶ 17; State v. Munoz, 2001 MT

85, ¶¶ 5-10 (state conceded it breached the plea agreement). Where a prosecutor fails to make the recommendation contained in a plea agreement, “the prosecutor did not satisfy the strict and meticulous standards of performance of the plea agreement and thereby breached that agreement.” Bowley, 282 Mont., at 312, 938 P.2d at 600. The failure of the state to honor the plea agreement it makes “constitutes a breach[.]” In the Matter of H.C.R., 2007 MT 64, ¶ 17, 336 Mont. 369, 155 P.3d 1221.

In Gunn v. Ignacio, 263 F.3d 965 (9th Cir. 2001), the court held that the state breached a plea agreement, on facts similar to those presented here. In return for Gunn’s guilty pleas on two counts, the state agreed not to oppose concurrent sentences for those two convictions. A presentence report recommended that the sentences be served consecutively. The difference between concurrent sentences and consecutive sentences was the difference between 18 years in prison or 36 years in prison. At sentencing, a prosecutor new to the case told the judge that the state did not oppose concurrent sentences, but then stated that the prosecution concurred in the presentence recommendation for consecutive sentences. The court held that the state’s attorney had breached the plea agreement when he concurred in the presentence report. “When a lawyer says at sentencing, ‘we concur with the presentence report,’ he concisely states an argument from

authority. The statement means, as a practical matter, ‘Your honor, you should sentence this defendant to X, not just because I say so, but because the objective and experienced arm of the court, the probation and parole office, so recommends.’” 263 F.3d at 970.⁶

Here, the state’s promise in the plea agreement was clear: it would argue for imposition of a 40 year term, with no time suspended. At sentencing, the prosecutor made the agreed-upon recommendation. She then went further, and adopted the recommendation of the PSI, and urged the court to restrict Kenny Weimer’s parole for 20 years. This is clearly a substantial change, for it meant he would have to serve an additional 10 years before becoming eligible for parole. The state clearly breached the plea agreement.

2. The Court’s Findings of Fact are Clearly Erroneous, and the Conclusions Incorrect as a Matter of Law.

In construing a plea agreement, the court must determine what the defendant reasonably understood to be the terms of the agreement when he pleaded guilty.

United States v. De la Fuente, 8 F.3d 1333, 1337 (9th Cir. 1993); Gunn v. Ignacio, 263 F.3d at 970; Brown v. Poole, 337 F.3d at 1159-60. Sec. 46-12-204(2), MCA,

⁶ Weimer did not claim that the recommendation contained in the PSI constituted a breach. Therefore, the court’s conclusion of law on this point is immaterial. Cf., Order, Conclusion 4.

requires the court to determine that a guilty plea is voluntary, and to inquire as to whether the defendant's results from discussions between the prosecutor and defense counsel. Sec. 46-12-211(2), MCA, requires that if a plea agreement has been reached, the court shall, on the record, require a disclosure of the agreement in open court, or, on a showing of good cause in camera, at the time the plea is offered. Focusing on the defendant's reasonable understanding reflects the proper constitutional focus on what induced the *defendant* to plead guilty. De la Fuente, 8 F.3d at 1337 n. 7 (emphasis in original); Brown v. Poole, 337 F.3d at 1159-60.

Defense counsel's understanding of the terms of the agreement is immaterial. "[T]he validity of a bargained guilty plea depends finally upon the voluntariness and intelligence with which the defendant - and not his counsel - enters the bargained plea." United States v. Harvey, 791 F.2d 294, 301 (4th Cir. 1986). In United States v. Wood, 378 F.3d 342, 350 n. 5 (4th Cir. 2004), the Court, citing this rule from Harvey, noted that defense counsel's understanding of the disputed provision in a plea agreement was immaterial.

The defendant's understanding at the time he pleaded guilty controls. Sec. 46-12-211(2), MCA; De la Fuente, 8 F.3d at 1337 and n. 8 (citing cases). That court rejected the government's argument that the defendant's understanding at the time of sentencing controlled. "[U]nder general principles of contract law, it

would be bizarre to look to the time of final performance rather than to the time of contract formation in construing the parties' intent." Ibid.

Kenny Weimer testified as to his understanding of the agreement at the time he entered his guilty plea. He testified that he believed that the state would recommend a 40-year term of imprisonment, with no time suspended. He understood that his attorney would ask for a 40-year terms, with 20 years suspended. Weimer said he did not know or understand at the time of entry of his guilty plea that the state felt free to also recommend any restriction on his parole eligibility. The district court rejected Weimer's testimony as "not credible," without any explanation or discussion to support this finding. This finding is erroneous, as the record supports Kenny's testimony.

This Court normally defers to the district court's assessment of witness credibility and evidentiary weight. In the Matter of G.M., 2008 MT 200, ¶ 38. However, findings regarding credibility are not insulated from appellate review. In In the Matter of G.M., the lower court made no comment on the credibility of witnesses and gave no indication of why it resolved conflicting evidence in the way it did. ¶¶ 21, 38. This Court conducted a thorough review of the evidence, and concluded that the lower court's findings of fact were clearly erroneous. ¶ 50.

Objective considerations ignored by the lower court support Kenny's testimony. First, his testimony is supported by the express terms of the plea agreement. The plea agreement does not contain any specific term regarding the state's authority to recommend a restriction on parole eligibility.

The court found that defense counsel drafted the plea agreement on November 28, the day before Weimer entered his guilty plea. Order, Finding 6. The court also found that found that Johnson discussed "the parameters" of the agreement with Weimer "both before and at the sentencing hearing." Id. These findings are insufficient and immaterial. There was no evidence offered by the state, including from Johnson, its witness, that Johnson had this discussion with Weimer prior to November 29, when Weimer changed his plea. As noted, the time of entry of the plea controls.

The "parameters" of the plea agreement which Johnson may or may not have discussed are not in issue. The question is whether Weimer knew before he pleaded guilty that the state claimed to have reserved the right to recommend a parole eligibility restriction. Johnson testified that it was his "impression" that he told Weimer that the state was free to argue for any legal sentence. Evid. Tr., at 23. He did not testify that the "maximum sentence" clause was the source for the state's authority to do so. It was Johnson's best recollection that he told Weimer

that the state would recommend a parole eligibility restriction, and this would not be a breach of the plea agreement. Evid. Tr., at 28-29. Again, there is no evidence that these discussions preceded Weimer's guilty plea.

The court ignored in its findings Mr. Johnson's testimony, to the effect that he could not be sure he adequately explained everything to Weimer. Evid. Tr., at 31-32. Thus, the record does not prove what Johnson told Weimer, when he told Weimer, or what Weimer understood.

The state could not offer copies of any letters or memoranda memorializing any conversation between Weimer and his counsel, or between the prosecutor and defense counsel.

The court's finding that Ms. Adams discussed her intent to recommend a parole restriction with Mr. Johnson on the day of sentencing is irrelevant. Order, Finding 7. Again, the time of sentencing is not determinative. The defendant's understanding of the plea at the time of entry of the plea controls.

The reasonableness of Kenny's understanding of the terms of the plea agreement is evident in the change-of-plea hearing. There, the prosecutor and defense counsel had both the duty and the opportunity to advise the judge of all of the terms of the plea agreement. Neither attorney gave any indication that despite the written terms of the agreement, they had agreed on the side that the state could

ask for a parole eligibility restriction. In fact, the first time the state even mentioned a parole eligibility restriction was after the PSI was filed, and even then, the prosecutor specifically couched her recommendation for a parole restriction on the PSI, and not on a supposed agreement with defense counsel.

Further, at the plea hearing the judge informed Kenny that 40 years was the maximum sentence he could receive for mitigated deliberate homicide. The judge thus reinforced Kenny's understanding based on the written plea agreement.

The court erred as a matter of law in rejecting the testimony from Kenny's mother. The judge rejected her testimony not because it was not credible, but because she was not a party to the plea agreement. This is an incorrect legal ruling. Ms. Weimer's testimony affords objective support for Kenny's understanding of the plea agreement. Ms. Weimer was intimately involved in the preparations for a defense, going so far as to pay for her son's public defender to fly to Seattle to meet with Kenny in the hospital. Kenny's parole eligibility was a concern for her, and she did not know that the state had reserved the right to seek a parole eligibility restriction. She was not informed by counsel of the state's intent to seek imposition of a parole eligibility restriction. Given her involvement and discussions with her son, if Kenny had been informed before he pleaded guilty that the state would also seek a parole eligibility restriction, he would have told her.

The court likewise erred in rejecting for the same reason the testimony of Ms. Doss, the probation officer. She reviewed the plea agreement and had the same understanding of the terms of the agreement as Weimer: if the court adopted the state's recommendation of 40 years, with no time suspended, Weimer would be parole-eligible in 10 years. Ms. Doss's testimony bolsters the reasonableness of Kenny Weimer's testimony. The court's rejection of her testimony on the ground that it was "speculation" is patently wrong: she testified as to her understanding and belief about how state law applied to the terms of the plea agreement, based on her position as a probation officer.⁷ Her testimony was not speculation.

3. The Court Erred in Construing any Ambiguity in the Plea Agreement Against Weimer. The State was Responsible for any Lack of Clarity, and Should Bear the Responsibility.

Although the state did not argue that the clauses in the plea agreement are ambiguous, the district court concluded that any ambiguity in the clause "[i]t is understood that this recommendation is the maximum sentence under Section 45-

⁷ By operation of law, a forty-year term was the maximum sentence available upon conviction for mitigated deliberate homicide. Sec. 45-5-103(4), MCA. A person serving a time sentence may not be paroled until that person has served at least one-fourth of the full term. Sec. 46-23-201(3), MCA.

5-103(1)” should be held against Weimer. Order, COL 5. This conclusion is not supported by the facts and is wrong as a matter of law.

A plea agreement is a contract and is subject to contract law standards. State v. Rahn, 2008 MT 201, ¶14.⁸ Under general rules of contract law, when a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone if possible. Sec. 28-3-303, MCA. The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity. Sec. 28-3-401, MCA. Generally, the words of a contract are to be understood in their ordinary and popular sense rather than according to their strict legal meaning. Sec. 28-3-501, MCA. The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable, each clause helping to interpret the other. Sec. 28-3-202, MCA. Where the language of a contract is unambiguous, and reasonably susceptible to only one interpretation, the duty of the court is to apply the language as written. Corporate Air v. Edwards Jet Center, Inc., 2008 MT 283, ¶32, 345 Mont. 336, 190 P.3d 1111.

⁸ Plea agreements include an implied covenant of good faith and fair dealing. Vanden Hoek v. Weber, 724 N.W.2d 858 (S.D. 2006)(citing cases); Cole v. State, 922 A.2d 354, 359 (Del. 2005)(a covenant of good faith and fair dealing applies to plea bargains); State v. Foster, 180 P.3d 1074, 1079 (Kan.App. 2008).

Whether an ambiguity exists in a contract is a question of law. The existence of an ambiguity must be determined on an objective basis, and an ambiguity exists only if the language is susceptible to at least two reasonable but conflicting meanings. Edward Jet Center, Inc., at ¶32. A conclusion of ambiguity is not compelled by the fact that the parties or their attorneys suggest opposing interpretations of a contract, or even disagree as to whether the contract is reasonably open to just one interpretation. Mary J. Baker Revocable Trust v. Cenex Harvest St. Cooperatives, Inc., 2007 MT 159, ¶ 21, 338 Mont. 41, 164 P.3d 851.

Here, the “maximum sentence” clause specifically refers to the preceding clause, in which the state announced its intention to recommend a forty-year term, with no time suspended. Read together, these two clauses provide merely that the state’s recommendation of 40 years, with no time suspended, was “the maximum sentence” available for the offense to which Weimer pleaded guilty. A person reasonably would understand these clauses to mean what they say - 40 years, with no time suspended, is the most punishment a person can receive for this crime.⁹ A

⁹ Sec. 45-5-103(4), MCA, provides the punishment available upon a conviction for mitigated deliberate homicide:

(4) A person convicted of mitigated deliberate homicide shall be imprisoned in the state prison for a term of not less than 2 years or

reasonable person would not understand these clauses to mean that in addition to the term to be recommended, the state also could ask for additional punishment which would significantly increase the time one spent in prison before becoming parole eligible.

Probation officer Doss did not read any ambiguity in the plea agreement. She read the plea agreement, and understood it to mean that under the state's recommendation, Weimer would have to serve one-fourth of the sentence before becoming parole eligible. Ms. Doss, Weimer, and his mother did not understand that the state was free to recommend a parole eligibility restriction, because this was not in the plea agreement.

Further, the state's argument, that the "maximum sentence" language should be read to include a parole eligibility restriction, is patently unreasonable. An experienced prosecutor who wanted to memorialize in a plea agreement her authority to argue for a parole eligibility restriction would simply say so, in so many words. The state's strained interpretation of the plea agreement is wholly unreasonable, and does not render the specific clauses somehow ambiguous.

more than 40 years and may be fined not more than \$50,000, except as provided in 46-18-219 and 46-18-222.

Even assuming for the sake of argument that the “maximum sentence” clause in the agreement is ambiguous, the district court erred in holding that Weimer was responsible. The court assigned responsibility for any ambiguity to Weimer, because his attorney drafted the plea agreement, and under ordinary contract law, ambiguities in a written agreement are to be borne by the drafter. Order, Conclusion 5, citing Martin v. Crown Life Ins. Co., 202 Mont. 461, 468-69, 658 P.2d 1099, 1103 (1983).

The court’s ruling ignores the undisputed fact that the allegedly ambiguous clause was actually inserted into the plea agreement at the *prosecutor’s* insistence. Ms. Fisher testified that she demanded insertion of the clause. Evid. Tr., at 44. The state was thus responsible for the clause in question, rather than Weimer. As a matter of undisputed fact, the state, and not Weimer, was in effect the drafter of the supposed ambiguous clause.

Because the prosecutor was responsible for the clause which the court suggested was ambiguous, the court erred as a matter of law in not holding the state responsible for any ambiguity. As a matter of contract law, in cases of uncertainty not removed by parts 1 through 5 of Title 28, Chapter 3, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. Sec. 28-3-206, MCA.

Further, ambiguities should have been borne by the prosecutor, who insisted on insertion of the questioned clauses, as a matter of due process. Courts have recognized that the rules governing contract interpretation may have to be tempered by constitutional protections, in particular cases. The plea bargain phase, “and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances.” Santobello, 404 U.S., at 262. “[T]he defendant’s underlying ‘contract’ right is constitutionally based and therefore reflects concerns that differ fundamentally from and run wider than those of commercial contract law.” United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986). Further, courts must be concerned with the “honor of the government, public confidence in the fair administration of justice, and the effective administration of justice[.]” *Ibid*. Accord, State v. Palmer, 524 S.E.2d 661, 665 (W.Va. 1999)(applying these same concerns in state prosecutions.) Thus, “[p]lea agreements ... are unique contracts ‘in which special due process concerns for fairness and the adequacy of procedural safeguards obtain.’” Carnine v. United States, 974 F.2d 924, 928 (7th Cir. 1992)(citation omitted).

Fundamentally, the language of the plea agreement is unambiguous. The court erred in failing to enforce the express terms of the contract. The state should have been held to the recommendation it promised in the plea agreement to make.

4. Weimer is Entitled to Relief.

The plea agreement provided that he could withdraw his plea if the state breached the plea agreement. See, DC 19. Because the state in fact and in law breached the plea agreement, Weimer should have been permitted to withdraw his guilty plea.

Weimer is entitled to relief as a matter of due process, as well. A defendant's state and federal due process rights permit him or her to enforce the terms of the plea agreement. Santobello, *supra*; Brown v. Poole, 337 F.3d at 1159; State v. Munoz, 2001 MT 85, ¶ 13. A non-breaching defendant must be afforded the initial right to choose from available remedies where the state breaches a plea agreement. Munoz, 2001 MT 85, ¶ 38.

VI. CONCLUSION

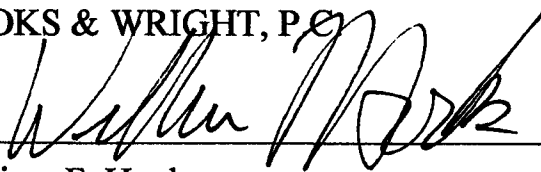
The state breached the plea agreement. The plea agreement granted Weimer the authority to seek relief in the event of a breach by the state. He is entitled to relief for the state's breach. The lower court erred, and violated his state and federal due process rights, when it failed to grant relief due to the state's breach.

This Court should reverse the decision of the district court.

Dated this 21st day of May, 2010.

HOOKS & WRIGHT, P.C.

By:

A handwritten signature in black ink, appearing to read 'William F. Hooks', is written over a horizontal line.

William F. Hooks

Counsel for Kenny Weimer

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 10-0081

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KENTON RICHARD WEIMER,

Defendant and Appellant.

APPENDIX TO APPELLANT'S BRIEF

Plea Agreement and Acknowledgment of Rights Exhibit A

Judgment and Sentence Exhibit B

Findings of Fact, Conclusions of Law and Order Exhibit C